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No. 03-1579

IN THE

Supreme Court of the United States

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.,
Petitioner,

v.

VERIZON INTERNET SERVICES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

TIME WARNER'S BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TIME WARNER'S BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Time Warner Inc. ("Time Warner") respectfully submits this brief *amicus curiae* in support of petitioner.[1]

INTEREST OF *AMICUS CURIAE*

This case involves a dispute between copyright holders, on one side, and Internet service providers ("ISPs"), on the other. The petitioner, RIAA, representing copyright holders, seeks access to the identities of persons who engage or have engaged in the on-line exchange of music recordings through so-called file-swapping on "peer-to-peer" systems like KaZaA, Morpheus, and Grokster. RIAA invoked the subpoena process of the Digital Millennium Copyright Act ("DMCA"), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in various provisions of Title 17). The respondent, Verizon, a major ISP, agrees that file-swapping violates copyright law. It also agrees that it can be made to divulge its subscribers' identities in so-called "John Doe" actions. But it resists the DMCA's more expeditious subpoena procedure.

Time Warner is uniquely situated to appreciate the parties' positions: it has interests on both sides of this dispute. Time Warner is one of the world's largest copyright holders, being the parent company of Warner Bros. Pictures, Warner Home Video, Warner Bros. Television Production, New Line Cinema, Turner Broadcasting System, various local news channels, Home Box Office, The WB Network, Time Inc., and Time Warner Book Group

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have consented to the filing of this brief. We have filed their consent letters with the Clerk of the Court.

(owner of Warner Books and Little, Brown and Company).[2] At the same time, Time Warner is also the parent company of the Nation's largest provider of Internet access service, America Online, which has some 24 million dial-up and broadband subscribers. In addition, another Time Warner subsidiary, Road Runner, provides high-speed Internet service to more than 3 million subscribers of Time Warner Cable.

As the parent company both of copyright-holding entities and of ISPs, Time Warner brings a unique perspective to this dispute that it believes may be valuable to the Court. Some ISPs may undervalue the harm illegal file-swapping inflicts on copyright owners and may have little incentive to refrain from advocating positions that would unduly hamper copyright owners' efforts to enforce their rights. Conversely, copyright owners may assign little weight to burdens imposed on ISPs and may have little incentive to refrain from advocating positions that would impose unwarranted costs. By contrast, Time Warner's interest lies in a balanced result that will protect the interests of copyright holders in the battle against online piracy, while ensuring that ISPs do not face unreasonable burdens and costs.

ARGUMENT

The purpose of this brief is not to repeat the legal arguments made in the RIAA's well-reasoned petition for a writ of certiorari, with which Time Warner agrees. Rather, the purpose of this brief is to underscore and illustrate the practical significance of the legal issues at stake from the perspective of a firm with interests on both

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[2] In a transaction that closed in March 2004, Time Warner sold its interest in Warner Music Group Inc. and its affiliated music companies.

the copyright-owner and ISP sides of the case. In addition, we will further highlight the erroneous nature of particular aspects of the court of appeals' legal analysis.

I. THE QUESTION PRESENTED IS OF CRUCIAL SIGNIFICANCE TO IMPORTANT SECTORS OF THE U.S. ECONOMY.

There is no question that the unauthorized copying of copyrighted works via "peer-to-peer" systems like KaZaA, Morpheus, and Grokster constitutes illegal copyright infringement on a massive and unprecedented scale. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013-14 (9th Cir. 2001). "Every day, ordinary people download billions of files: blockbuster movies, cable TV shows, music, video games, software, and nearly every other kind of copyright-protected material available in digital form." Kenneth Terrel & Seth Rosen, *A Nation of Pirates*, U.S. News & World Rep., July 14, 2003, at 40, *available at* 2003 WL 2022009.

This illegal file-swapping has taken a severe toll on the music industry: "Only five years ago, music sales were booming. Today, the industry is nearly paralyzed by piracy." Ronald Grover & Heather Green, *The Digital Age Presents Hollywood Heist, Will Tinseltown Let Techies Steal the Show?*, Bus. Wk., July 14, 2003, at 74, *available at* 2003 WL 8815656. "According to the RIAA, about 2.6 billion copyrighted files, mostly songs, are downloaded over the Internet per month, which the organization says is the leading cause of the worldwide decline in music industry sales from $40 billion in 2000 to $26 billion in 2002." John Ward Anderson, *Techno-Rebels in West Bank?; File Swapping Firm Claims Odd Hide-Out*, Wash. Post, Feb. 22, 2004, at A29, *available at* 2004 WL 55840419; *see generally* Pet. 18 ("retail sales

of music have plummeted, falling 7% in 2000, 10% in 2001, 11% in 2002, and 7% in 2003").

The threat is just as great for the movie industry: "Already as many as 600,000 movie files are shared each day on peer-to-peer file-sharing networks such as Morpheus and Grokster, according to the Motion Picture Association of America (MPAA). That number is likely to soar as more households get broadband internet and compression technology cuts download time." *Tipping Hollywood the Black Spot — The Digital Threat to Hollywood*, Economist, Aug. 30, 2003, at 43, *available at* 2003 WL 58583842; *see also* Pet. App. 137a ("With broadband connections becoming more and more widespread, it is increasingly more common that the larger files containing full-length motion pictures are copied back and forth.") (footnote omitted). "Last year the film industry . . . would have made $3.5 billion more if not for piracy . . . . Next year the loss may rise to $5.4 billion." Amanda Ripley, *Hollywood Robbery; How Does a Hit Movie Go From the Free Market to the Black Market?*, Time Mag., Jan. 26, 2004, at 56, *available at* 2004 WL 61549448. Piracy "hands the keys to the castle to copyright pirates, hurting the livelihood of thousands of people, from big-name stars to grips, gaffers and carpenters." Doug Mellgren, *Teen A Villain To Hollywood*, L.A. Times, Mar. 11, 2001, at B1, *available at* 2001 WL 2468652 (internal quotation marks omitted).

The most natural targets of copyright owners' efforts to enforce their rights are the purveyors of peer-to-peer software and operators of file-swapping networks, who seek to profit from this illegal activity primarily by selling advertising. But pursuing such entities does not hold out a complete solution: to the extent that they can be shut down or controlled at all (some have relocated to exotic

locations, *see* Pet. 18 n.15), new ones inevitably appear.[3] Moreover, closing down these entities does not necessarily eliminate the problems that they create: "Unlike Napster, which relied upon a centralized communication architecture to identify the .mp3 files available for download, the current generation of P2P file sharing programs allow an internet user to search directly the .mp3 file libraries of other users; no web site is involved." Pet. App. 3a; *see also Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp.2d 1029, 1041-43 (C.D. Cal. 2003) (holding — mistakenly in our view — that certain peer-to-peer systems' structure avoids secondary infringement), *appeal docketed*, Nos. 03-55894, *et al.* (9th Cir. May 29, 2003).

That is why the music industry was forced to pursue file-swappers with lawsuits. *See generally* Pet. App. 140a. In the wake of these lawsuits, the use of peer-to-peer services began to wane, and music sales rebounded. *See* Pet. 27 n.18; *see also* Ethan Smith, *Music Industry's Move Against Swappers Hits a Snag Just as Impact Takes Hold*, Wall St. J., Dec. 22, 2003, at B1, *available at* 2003 WL-WSJ 68131582 ("the three-year slide in music sales began to slow dramatically on almost precisely the same date the suits [against swappers] were filed, amid massive publicity"); Mike France, *Music Pirates, You're*

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[3] *See* Mike France, *Striking Back; How the Music Industry Charted its Crusade Against Web Pirates*, Bus. Wk., Sep. 29, 2003, at 94, *available at* 2003 WL 62195792 ("Though lawyers shut down Napster in July, 2001, other peer-to-peer networks carefully designed to skirt the law, such as Morpheus and Grokster, quickly rose up in its wake."); Bruce B. Auster, *I Want My MP3, But Who Pays the Bill? Closing Napster Won't Kill Digital Music Online*, U.S. News & World Rep., Feb. 26, 2001, at 44, *available at* 2001 WL 6319789 ("No matter how good the technology, the industry won't be able to chase and close every last free-music site.").

Sunk, Bus. Wk., Sep. 8, 2003, at 40, *available at* 2003 WL 62195471 ("After the number of households downloading music from the Internet climbed to a high of 14.5 million in April, it dwindled to 12.7 million in May and 10.4 million in June, according to market researcher NPD Group Inc.").

The music industry was able to mount such an effective campaign in important part because of the DMCA's subpoena provision, 17 U.S.C. § 512(h). As the court of appeals noted, copyright owners "can readily obtain the screen name of an individual user, and using the Internet Protocol (IP) address associated with that screen name, can trace the user to his ISP. Only the ISP, however, can link the IP address used to access a P2P program with the name and address of a person — the ISP's customer — who can then be contacted or, if need be, sued by the RIAA." Pet. App. 3a; *see also* Pet. 10; Pet. App. 18a. Section 512(h) bridges that gap by allowing copyright owners to "request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer." 17 U.S.C. § 512(h)(1).

This procedure is plainly more efficient than the alternative, filing so-called "John Doe" lawsuits against an anonymous infringer and requesting expedited third-party discovery against the infringer's ISP. That option does not yield the infringer's name as quickly as a Section 512(h) subpoena, which is precisely why Congress created Section 512(h)'s more "expeditiou[s]" procedure. *Id.* § 512(h)(4); *see also* H.R. Rep. No. 105-551(II), at 61 (1998) ("The issuing of the order should be a ministerial function performed quickly for this provision to have its intended effect."). Given the "ease with which digital works can be copied and distributed worldwide virtually instantaneously," Pet. App. 35a-36a, any delay can harmfully "undermine the ability of copyright owners to act

quickly to prevent further infringement of their copyrights." *Id.* at 45a. Indeed, the delay attendant upon John Doe suits can altogether defeat recourse when ISPs fail to retain identifying information. *See* Pet. 27, 28.

Quite apart from the delay inherent in John Doe suits, they are less efficient. For one thing, John Doe suits impede settlement. Whereas the DMCA's subpoena mechanism allows parties to seek a resolution short of filing suit, that is not an option with John Doe suits: the only way to identify the infringer is by filing an actual lawsuit. For another thing, John Doe suits bring additional "effort and expense" for copyright holders, Pet. App. 45a, and place a heavy "burden on the federal courts," *id.* at 45a-46a.

Time Warner recognizes that DMCA subpoenas may impose a compliance burden on ISPs, *see id.* at 34a — a burden of which it has borne the full brunt in its America Online and Road Runner businesses. Particularly when large numbers of subpoenas are being served within short periods of time, compliance with Section 512(h) requires a dedication of substantial resources. For example, for every subpoena, ISP employees need to conduct a complex process to identify the subscriber involved. In addition, the ISP's law department typically reviews subpoenas and, as a matter of practice, sends prompt notification to customers. Because of this burden, Time Warner believes that ISPs must be granted a reasonable time to respond and, in appropriate cases, should be compensated for their assistance in accordance with applicable procedural rules.

That said, Time Warner believes that the DMCA process as it functioned prior to the decision below properly balanced the interests of ISPs and copyright holders by limiting ISPs' liability for subscribers' acts of copyright

infringement while requiring ISPs to assist in combating online infringement, including by identifying infringing subscribers through the streamlined DMCA subpoena process. The DMCA accomplishes this while providing "substantial protection to service providers and their customers against overly aggressive copyright owners and unwarranted subpoenas." Pet. App. 47a.

The D.C. Circuit's decision threatens to derail efforts of copyright holders to protect their legal rights and staunch the flow of Internet piracy. Without a quick and efficacious way of identifying file-swappers, it is difficult to curb piracy in an effective way. And, unless Internet piracy is brought under control, the copyright-intensive music and movie industries will continue to suffer serious harm. Indeed, ISPs themselves, to the extent they attract customers by making available copyrighted materials lawfully, are harmed by the massive piracy currently in progress. In each of the industries affected, substantial amounts of risk-bearing investment and numerous well-paying jobs hang in the balance. The petition thus raises issues of vital importance to large sectors of the Nation's economy. It should be granted for that reason alone.

II. THE COURT OF APPEALS' CONSTRUCTION OF THE STATUTE IS CLEARLY IN ERROR.

Review is particularly warranted because the D.C. Circuit's construction of Section 512(h) is plainly incorrect.

A. The Court of Appeals' Construction Ignores the Legislative Compromise Embodied in the Plain Text of the Statute.

Title II of the DMCA enacted a carefully calibrated compromise between interests of copyright holders and

interests of ISPs.[4] "Congress attempted to balance the liability protections for service providers with the need for broad protection of copyrights on the Internet." Pet. App. 38a. Thus, for example, Congress conditioned ISPs' immunity from damages upon their taking down certain infringing material, *see, e.g.*, 17 U.S.C. § 512(c)(1)(C), and terminating the accounts of certain repeat infringers, *see id.* § 512(i).[5] And, of particular interest for purposes of this case, Congress required ISPs "to expeditiously disclose" the identity of infringing subscribers in response to a special subpoena. *See id.* § 512(h)(3).

Speaking as a company that is both a major ISP and a major copyright holder, we find it utterly implausible that Congress would have wanted to reconcile the interests of the stakeholder groups by exempting "conduit" ISPs (*i.e.*, ISPs transmitting infringing material at the behest of subscribers) from the subpoena provision. As the district court correctly put it: "There is no discernable reason why Congress would limit the subpoena authority under subsection (h) to subsection (c) service providers alone." Pet. App. 34a; *see id.* at 41a-42a ("There is no logical connection between the line Verizon seeks to draw and the objectives Congress sought to achieve through the DMCA."). Indeed, the court of appeals identified no such reason.

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[4] *See, e.g.*, S. Rep. No. 105-190, at 9 (1998) ("Title II . . . reflects 3 months of negotiations supervised by Chairman Hatch and assisted by Senator Ashcroft among the major copyright owners and the major . . . ISP's.").

[5] Congress balanced these requirements with liability for infringement notices containing knowing and material misrepresentations, *see* 17 U.S.C. § 512(f), and a "put back" procedure for material erroneously identified as infringing, *see id.* § 512(g).

That failure is particularly troubling because, even at the time the DMCA was enacted in 1998 (one year before Napster, the first peer-to-peer system, burst onto the scene in 1999[6]), Internet users *were* making copyrighted materials available for illegal copying from their own computers.[7] It would have been strange, to say the least, for a Congress so well-informed by the major industry participants to allow use of the subpoena process to combat piracy on ISP servers but somehow to exempt piracy on home computers. That approach would deny copyright owners access to the subpoena process precisely when they need it most: whereas copyright owners can stop server-based copyright infringement simply by pursuing an easily-identifiable ISP, they can stop home-computer-based infringement only if an ISP helps them identify its anonymous subscriber.

Moreover, if Congress had meant to immunize conduit ISPs from the DMCA's subpoena reach, one would have expected to see some sign of it in Section 512(h), the provision in which the statute — wholly separate from the four substantive liability limitations — specifically addresses the subpoena topic. Yet Section 512(h) displays no such sign. To the contrary, Section 512(h) broadly proclaims that any "copyright owner" may obtain "a subpoena to a service provider for identification of an alleged infringer." 17 U.S.C. § 512(h)(1). And, for purposes of Section 512(h), the statute defines "service provider"

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[6] *See A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp.2d 896, 900 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001); *see also* Pet. App. 135a.

[7] *See* Pet. 3-7, 25-26; *see also* Br. for the United States as Intervenor and *Amicus Curiae*, *RIAA v. Charter Communications, Inc.*, No. 03-3802, at 31-32 (8th Cir. filed Feb. 24, 2004), *available at* http://www.ca8.uscourts.gov/briefs/04/03/intervenor/033802_1br.pdf?A1=View+Brief.

broadly enough to include conduit ISPs, *see id.* § 512(k)(1)(B), even though the statute specifically excludes conduit ISPs from the definition for purposes of another subsection, *see id.* § 512(k)(1)(A). That should have been the end of the matter: there is no cause to squint at sections other than Section 512(h) in search of implicit limitations.

B. The Court of Appeals' View of the Structure of the Statute Is in Error.

As the court of appeals pointed out, Section 512(h)(2)(A) requires a subpoena applicant to file "a copy of a notification described in subsection (c)(3)(A)." *Id.* § 512(h)(2)(A). Subsection (c)(3)(A) describes a notification that, among other things, identifies "the material . . . that is to be removed or access to which is to be disabled." *Id.* § 512(c)(3)(A). Clearly, Congress concluded that an ISP receiving a Section 512(h) subpoena should be informed of the nature of the infringement with which its subscriber is charged. That makes good sense: it helps the ISP unearth the requested information and allows it to decide, say, whether it should inform its subscriber of the allegations or whether it should voluntarily block access or terminate the subscriber's account.

But the court of appeals saw in Section 512(h)(2)(A)'s reference to Subsection (c)(3)(A) a structural problem. As the court noted, the notifications described in Subsection (c)(3)(A) serve an immunity-related purpose under Subsections (b), (c), and (d). Under those provisions, the court of appeals said, (c)(3)(A) notifications serve a "notice and take-down" purpose: when a copyright holder sends a (c)(3)(A) notification to an ISP, the ISP must "take down" infringing material if it wishes to claim immunity under Subsections (b), (c), and (d). *See* Pet. App.

8a, 13a.[8] By contrast, Subsection (a) does not condition immunity on remedial steps in response to a "take down" notice. *See* Pet. App. 8a. The court of appeals concluded that, because a conduit ISP thus cannot be sent a (c)(3)(A) notification that is "effective" to trigger immunity-related duties, Congress could not have intended subpoenas to be available against conduit ISPs. *Id.* at 14a.

But just as courts must not disregard plain statutory language on the basis of their reading of legislative history, *see Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994), so courts must not disregard plain statutory language on the basis of vague structural notions unless "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).[9] Perhaps the statutory scheme envisioned by the court of appeals appealed to its desire for systemic tidiness, but that scheme is squarely at odds with the legislative compromise as embodied in the statutory text.

Contrary to the court of appeals' implication, *see* Pet. App. 12a, Section 512(h)(2)(A) does not require a subpoena applicant to file a notification that is "effective under" subsection (c)(3)(A) — it merely requires a notifica-

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[8] Insofar as subsection (b) is concerned, the court of appeals' premise is only partially correct. That provision requires ISPs to "take down" infringing material only in certain narrowly defined circumstances. *See* 17 U.S.C. § 512(b)(2)(E).

[9] *See also National Cable & Telecomms. Ass'n v. Gulf Power*, 534 U.S. 327, 335 (2002) (rejecting limiting inference based on "the structure of the Act" as being contrary to "the plain language of" the statute's operative sections); *United States v. Turkette*, 452 U.S. 576, 586-87 (1981) (rejecting argument that, because remedies against RICO "enterprises" include divestiture and dissolution, the statute's "structure . . . limits its application to legitimate enterprises").

tion of the kind "described in" that subsection. What emerges from the statutory text is a belief that, as part of the subpoena process, both the clerk of the district court and the ISP involved should receive a description of the offending conduct in a format that was simple, standardized, and containing indicia of reliability. Having already created such a format in subsection (c)(3)(A), Congress likely concluded that, although (c)(3)(A) notifications perform an immunity-related function in subsections (b) through (d), they could just as well serve an informational function in subsection (h). That Congress used the words "described in" indicates that Congress simply sought to incorporate the (c)(3)(A) vehicle by reference.

C. The Court of Appeals Erred in Relying on a Supposed Contrast Between Subsections (c)(3)(A)(iii) and (j)(1)(A).

The court of appeals saw further support for its reading in Subsections (c)(3)(A)(iii) and (j)(1)(A). As already seen, a subpoena applicant must file with the clerk "a copy of a notification described in subsection (c)(3)(A)." 17 U.S.C. § 512(h)(2)(A). And Subsection (c)(3)(A)(iii) requires the copyright holder to identify "material . . . that is to be removed or access to which is to be disabled." *Id.* § 512(c)(3)(A)(iii). According to the court of appeals, a conduit ISP "can neither 'remove' nor 'disable access to' the infringing material because that material is not stored on the ISP's servers." Pet. App. 9a. The court of appeals apparently concluded that this language fits the conduit ISP situation so poorly that Congress could not have intended conduit ISPs to be subject to subsection (h)'s subpoena procedure.

Even if one reads subsection (c)(3)(A)(iii) as indicating that the removing or disabling must be done by the ISP,[10] the provision makes ample good sense. Congress likely thought that, after learning the identity of the subscriber, the copyright holder would seek an injunction against the ISP "restraining the service provider from providing access to [the subscriber] . . . by terminating the accounts of the subscriber." 17 U.S.C. § 512(j)(1)(B)(i). Such an injunction plainly would have the effect of "disabl[ing]" "access" for purposes of subsection (c)(3)(A)(iii): the ordinary meaning of those words is easily broad enough to cover account termination. *See* Pet. App. 33a n.5. Indeed, the court of appeals did not hold otherwise.

Instead, the court of appeals implied that the DMCA gives the words "disabl[ing]" "access" a meaning different from common parlance. It based that conclusion on an unrelated provision, Section 512(j)(1)(A), which provides that an ISP may be subjected to injunctions that prohibit it from either (i) "providing access to infringing material or activity residing at a particular online site on the [ISP's] system or network," or (ii) "providing access to a subscriber . . . who is engaged in infringing activity . . . , by terminating the accounts of the subscriber." 17 U.S.C. § 512(j)(1)(A). According to the court, that distinction signaled that "Congress considered disabling an individual's access to infringing material and disabling access to the internet to be different remedies." Pet. App. 10a.

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[10] The statutory language is cast in the passive voice. Thus, it is broad enough to refer to material that *the copyright holder* would like to see removed or made inaccessible — say, by, after learning the subscriber's identity, persuading him or her to remove the infringing files, or, failing that, having a court order the subscriber to do so.

Even if Section 512(j) in fact broadcast the signal that the court of appeals thought it received, that signal would be far too faint to overcome the power of Section 512(h)'s clear language. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes."[11] If Congress had intended to exempt conduit ISPs from Section 512(h)'s coverage, it would have done so directly (say, by excluding them from the definition of "service provider," *see* Pet. App. 31a-32a) — not through a convoluted connect-the-dots approach.

Besides, the signal that the court of appeals thought it received from subsection (j) simply is not there. If Sections 512(c)(3)(A)(iii) and 512(j)(1)(A)(i) had each spoken of "access disabling" whereas Section 512(j)(1)(A)(ii) spoke of "account termination," the court might have had the beginning of a point.[12] But Sections 512(j)(1)(A)(i) and 512(c)(3)(A)(iii) do not use identical terms. Section 512(c)(3)(A)(iii) broadly speaks of "material . . . access to which is to be disabled." 17 U.S.C. § 512(c)(3)(A)(iii). In contrast, Section 512(j)(1)(A)(i)

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[11] *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *see also American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613 (1991) ("As a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority [it has] granted . . . , we would have expected it to do so in language expressly describing [such] an exception.").

[12] Even that point would not necessarily be persuasive: Congress might have devoted Section 512(j)(1)(A)(ii) to account termination merely out of an abundance of caution — "a drafting imprecision venerable enough to have left its mark on legal Latin (*ex abundanti cautela*)," *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 646 (1990) — simply to dispel any question whether account termination might be available under Section 512(j)(1)(A)(i).

narrowly addresses disabling "access" to one particular kind of "material" — namely, material "residing at a particular online site on the provider's system or network." *Id.* § 512(j)(1)(A)(i). Thus, the two kinds of access disabling described in (j)(1)(A)(i) and (ii) are simply different species of the same "disabl[ing]" "access" genus mentioned in Section 512(c)(3)(A)(iii).[13]

Other subsections confirm this reading. Section 512(j)(1)(A)(ii) indicates that "terminating the accounts of the subscriber" is merely a form of not "providing access." *Id.* § 512(j)(1)(A)(ii); *see also id.* § 512(j)(1)(B)(i). In addition, Section 512(j)(2)(D) requires courts contemplating the issuance of an injunction to consider "whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available," *id.* § 512(j)(2)(D) — thereby indicating that all forms of injunctive relief listed in Subsection (j), including account termination, constitute "means of preventing or restraining access to the infringing material." Finally, Section 512(m)(2) states that the limitation on liability found in subsection (a) does not hinge on the ISP's "removing, or disabling access to material in cases in which such conduct is prohibited by law," *id.* § 512(m)(2) — again indicating that Congress expected conduit ISPs to disable access (presumably by terminating accounts).

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In short, there is no force to either of the two concerns that, according to the court of appeals, stood in the way

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[13] Similarly, if Section 512(c)(3)(A)(iii) spoke of "men," Section 512(j)(1)(A)(i) spoke of "men who are mortal," and Section 512(j)(1)(A)(ii) spoke of "Greeks," there might be a faint implication (easily overcome by common sense) that Greeks are immortal. But there would be no implication at all that Greeks are not human.

of enforcing Section 512(h)'s plain language. That is why the court of appeals' reasoning has been expressly disavowed by the Copyright Office,[14] whose interpretation is entitled to respect.[15] The court of appeals' error is causing massive injury. Given the size of the harm that is occurring every day to industries that are dependent on copyrights, the luxury of allowing further "percolation" is not affordable. Further review is needed now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[14] *See* Pet. App. 133a-34a, 142a; *see also* Br. for the United States as Intervenor and *Amicus Curiae*, *RIAA v. Charter Communications, Inc.*, No. 03-3802, at 19-27 (8th Cir. filed Feb. 24, 2004), *available at* http://www.ca8.uscourts.gov/briefs/04/03/intervenor/033802_1br.pdf?A1=View+Brief.

[15] *See* Pet. 16 n.14; *see also Udall v. Tallman*, 380 U.S. 1, 16 (1965) (courts must give exceptional deference to "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new") (internal quotation marks omitted).